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SUPREME COURT OF OHIO

No. 08-1089

**In The
Supreme Court of the United States**

JEFFERY WINKELMAN, *et al.*,
Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,
Respondent.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit*

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether administrative and judicial officers presiding over impartial due process hearings and subsequent court proceedings conducted pursuant to 20 U.S.C. § 1415(f)(1)(A) of the Individuals with Disabilities Education Act can consider testimony from members of a child's individualized education program team when determining whether the individualized education program provides the child with a free appropriate public education as required by 20 U.S.C. § 1412(a)(1).

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

This case is a textbook example of a matter that does not warrant this Court's review for numerous reasons. First, despite almost six years of litigation, the question presented by Petitioners was not raised below. Petitioners have never alleged the impartial hearing officer, state level review officer or lower courts erred in considering the testimony of the occupational therapist on Jacob Winkelman's individualized education program ("IEP") team. As such, this issue is not properly before this Court.

Second, the circuit split relied upon by Petitioners is illusory. Although Petitioners attempt to massage the facts of this case to create the perception of a split, this case is factually distinguishable from the Fourth, Ninth and Tenth Circuit cases upon which they rely. In those cases, the courts were asked to consider services that were not included in the IEP when deciding if the IEP offered by the school district provided a free appropriate public education ("FAPE"). Here, the lower courts were not asked to consider services that were not included in the IEP. Rather, they were asked to determine whether the occupational therapy services included in the IEP were reasonably calculated to provide Jacob a FAPE. In doing so, they considered testimony from the occupational therapist who drafted the section of the IEP in question. This testimony explained the rationale for the inclusion of an occupational therapy assessment in the IEP instead of occupational therapy goals due to the unique circumstances and Jacob's

needs. Given this key factual distinction, there is no circuit split.

Third, Petitioners' argument that the therapist's testimony constitutes extrinsic evidence that should not have been considered when reviewing the appropriateness of the IEP undermines the IDEA's statutory scheme. Under the IDEA, parents and school districts are afforded procedural safeguards which include the right to a due process hearing before an impartial hearing officer. 20 U.S.C. § 1415(f)(1)(A). Parties to these hearing are afforded additional rights, such as the right to present evidence and compel the attendance of witnesses. 20 U.S.C. § 1415(h). Petitioners' position that testimony regarding the content of the IEP is "extrinsic evidence", undermines this statutory scheme and would result in hearing officers and courts making critical decisions about the appropriateness of an IEP without the benefit of testimony from members of the IEP team. This is clearly not what Congress intended when it provided the right to a due process hearing.

Finally, this case presents a poor vehicle for *certiorari* as this Court's decision on the "four corners" issue will not alter the ultimate outcome. Petitioners have not carried their burden of proving Parma did not offer Jacob a FAPE. There is no evidence Jacob suffered substantive harm because his IEP contained an occupational therapy assessment as opposed to occupational therapy goals and objectives. Thus, even if this Court were to hold that the testimony of the occupational therapist constituted impermissible extrinsic evidence, Petitioners would not prevail on the merits making this case a poor vehicle for *certiorari*.

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to Section 1414(d)(1)(A)(i) of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et. seq.*, cited by Petitioners, Section 1415(b)(6), Section 1415(f)(1)(A) and Section 1415(h) are relevant to the Petition. Section 1415(b)(6) provides: "[a]n opportunity for any party to present a complaint - - with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child", while Section 1415(f)(1)(A) provides that whenever a complaint has been received pursuant to Subsection (b)(6), the parents or local educational agency involved in the complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State Educational Agency or by the local educational agency, as determined by State law or by the State educational agency." Section 1415(h) accords numerous rights to parties in due process hearings including "the right to present evidence and confront, cross-examine, and compel the attendances of witnesses."

STATEMENT OF THE CASE

A. IDEA Statutory Scheme

Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A school district provides a FAPE to a child with a disability by

offering an individualized program of special education, designed to meet the student's unique needs, that is provided in accordance with a properly developed IEP. *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982). A school district meets this obligation if it has (1) complied with the procedural requirements of the IDEA, and (2) developed an IEP which is reasonably calculated to provide an educational benefit. *Id.* at 206-207.

The IDEA provides procedural safeguards to parents that allow them to challenge decisions by a school district related to their child's identification, evaluation, placement or the school district's provision of a FAPE. A parent may challenge whether the IEP offered by the school district provides a FAPE by filing a due process complaint pursuant to 20 U.S.C. § 1415(b)(6). This entitles the parent to an "impartial due process hearing" conducted pursuant to 20 U.S.C. § 1415(f). These hearings are conducted by hearing officers who meet the qualifications set forth in 20 U.S.C. § 1415(f)(3)(A) and who are appointed in accordance with procedures adopted by the State Education Agency. OHIO ADM. CODE 3301-51-05(K)(8)(d); 3301-51-05(K)(10).

Parents and school districts who are parties to a due process hearing are entitled to numerous procedural safeguards including the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. 20 U.S.C. § 1415(h); OHIO ADM. CODE 3301-51-05(K)(11)(a). Any "party aggrieved" by a hearing officer's decision may ultimately appeal the decision to a United States District Court. 20 U.S.C. § 1415(i)(3); OHIO ADM. CODE

3301-51-05(K)(14)(b) (establishing a two tier system requiring appeal to Ohio Department of Education prior to appeal to court). In keeping with this statutory scheme, this case has been heard by an Impartial Hearing Officer, a State Level Review Officer, the United States District Court for the Northern District of Ohio and the Sixth Circuit Court of Appeals.

B. Factual Background¹

Jacob is a now twelve year-old boy who has been identified as a child with a disability under the IDEA due to a diagnosis of autism. JA 375.² This litigation began on June 2, 2003 when Jacob's parents, Jeff and Sandee Winkelman, filed a request for due process alleging the IEP offered by the Parma City School District ("Parma" or "District") for the 2003-2004 school year did not offer Jacob a FAPE. JA 353. Specifically, they challenged Parma's proposed public school placement at Pleasant Valley Elementary School ("Pleasant Valley"). To date, each administrative and judicial officer to consider this case has concluded Parma's IEP offered Jacob a FAPE.

¹ Petitioners' Statement of the Case fails to utilize the factual findings of the Impartial Hearing Officer, State Level Review Officer or the District Court. Instead, it construes the facts heavily in their favor by quoting extensively from the hearing testimony of Petitioner Sandee Winkelman. Moreover, the majority of these "facts" are wholly irrelevant to the Petition. They are addressed here simply to correct various misstatements.

² Citations to "JA" refer to the Joint Appendix filed in the Sixth Circuit Court of Appeals.

1. Jacob's Progress In Preschool At The Achievement Center.

Jacob was first evaluated by Parma to determine his eligibility for special education preschool services under the IDEA on September 1, 2000. JA 355. Upon completion of a multifactored evaluation ("MFE"), the team, including Mr. Winkelman, agreed Jacob was a Preschooler with a Disability. JA 374. The District developed an IEP for Jacob for the 2000-2001 school year. JA 445. The IEP contained goals in the areas of communication, language development and fine motor skills. *Id.* Under this IEP, Jacob attended Parma's First Step Preschool ("First Step").³

Although Jacob's progress reports from First Step indicated he was making progress, Mrs. Winkelman was not happy with the program. JA 295; 494-500. Mrs. Winkelman suggested placing Jacob at the Achievement Center – a public preschool specializing in educating children with autism. JA 295-96. Jacob's IEP team agreed the Achievement Center was an appropriate placement. JA 264-65.

Jacob began attending the Achievement Center at the start of the 2001-02 school year. JA 266-69; 458. Jacob's classroom teacher, Jacquelyn Gerber, observed that Jacob was a very verbal child who "had a lot of words." JA 179. To determine Jacob's strengths and weaknesses, Ms. Gerber assessed him using the

³ The appropriateness of the First Step Preschool was not before the Impartial Hearing Officer and is likewise not before this Court. Pet App. 98-100a. This background information is included solely to balance Petitioners' representations regarding Jacob's attendance at First Step.

TEACCH Preschool Checklist which lists preschool skills. JA 188-89. The results indicated Jacob had already mastered many of the skills on the checklist. JA 501-12. Jacob had needs in the areas of: transition skills; expressive and receptive communication; pragmatic language; fine motor skills; and classroom independence which were addressed in his 2001-02 IEP. JA 459.

Jacob did well at the Achievement Center and his IEP team developed an IEP for the 2002-03 school year that continued his placement there. JA 469. The present levels of performance in Jacob's 2002-2003 IEP noted he had mastered 80% of the TEACCH Checklist. *Id.* Jacob still needed to work on pre-reading skills, time concepts, number concepts, engaging spontaneously in pretend play, fine motor skills, and peer interaction. *Id.* Based on these needs, the team developed Jacob's 2002-03 IEP. *Id.*

On May 6, 2003, Jacob's IEP team met to discuss his progress during the 2002-2003 school year. JA 469. Once again, Jacob had made excellent progress. *Id.* Ms. Gerber indicated Jacob had made the greatest gains in the area of pre-academic skills and was beginning to independently engage in interactive play with a peer. JA 178; 184. The team, including Mr. Winkelman, signed the front page of the IEP under the heading "IEP Review 5/6/03" indicating the IEP was reviewed on that date. JA 469.

During the May 6th meeting, the team also addressed whether Jacob was eligible for extended school year ("ESY") services during the summer of 2003. The team agreed Jacob was eligible for ESY and noted on the IEP that he would attend a summer

program offered at the Achievement Center. JA 473. The IEP stated Jacob's ESY program would be three days per week, from 9:00 am until 2:00 pm, from July 1, 2003 through July 31, 2003. *Id.* The IEP did not indicate whether occupational, speech or music therapy to be provided during the summer program or any specific levels of service.⁴ *Id.*

2. Jacob's Multifactored Evaluation Reveals His Continued Eligibility Under The IDEA.

Jacob was transitioning from preschool to school-age programming at the end of the 2002-2003 school year. As a result, Parma completed an MFE to determine his eligibility for services as a school-age child. JA 146-47; 376. Jacob's MFE demonstrated he had made impressive gains during preschool in academics, communication and motor skills. JA 376-440. In addition to Jacob's progress, his MFE also noted his diagnosis of autism and identified continued areas of need. JA 437-38. Based on this information, the team members from Parma and the Achievement Center concluded Jacob was eligible for school-age services under the IDEA. JA 440. Mrs. Winkelman signed the MFE indicating her agreement with this decision. JA 440.

Notably, Jacob's MFE did not find that motor skills were a significant need or even that he had deficits in

⁴ This is contrary to Petitioners' contention that "... the School District agreed that Jacob needed occupational therapy during the summer of 2003." Pet. at 12. Because ESY was not an issue before the IHO, the record is devoid of details about the program. Pet. App. 98-100a.

this area.⁵ Indeed, the assessments of Jacob's motor skills included in the MFE found them to be on par with those of his same-age peers. Ms. Gerber's responses to the "Visual and Fine-Motor Skills" portion of the Kindergarten Checklist indicated Jacob had mastered the vast majority of the fine motor skills necessary for kindergarten. JA 392. The only two skills Jacob had not mastered were writing his last name and assembling puzzles. *Id.* On the Vineland Adaptive Behavior Scales completed by Ms. Gerber, Jacob's motor skills were rated as "adequate" and found to be "age appropriate." JA 382-83.

Contrary to Petitioners' assertions, Jacob's MFE did not "not[e] that Jacob continued to need occupational therapy services" Pet. at 4.⁶ Indeed, nowhere in the MFE did it state that Jacob should continue with direct occupational therapy service. JA 437-38. Rather, the MFE stated Jacob would "benefit from additional opportunities to *practice* fine-motor skills and visual perceptual tasks needed for school and self-care." JA 438 (emphasis added). The MFE did not state whether this "practice" should occur via direct occupational therapy services or as part of Jacob's activities in a kindergarten classroom.

The Petition also misrepresents the "Occupational Therapy Final Summary" completed by Maria Llerena.

⁵ Although the Petition would lead this Court to believe Jacob had extensive needs in the area of motor skills, according to his MFE, this simply was not the case.

⁶ The Petition is rife with misstatements regarding the findings and content of the MFE, only the most significant of which are addressed here.

JA 350-51. Contrary to Petitioners' statements, this document was not a final summary of the fine motor, sensory and self-care assessments conducted as part of Jacob's MFE. Pet. at 11-12. Indeed, it was not even *included* in the MFE. JA 376-440. Rather, it is a summary of Jacob's gains in the areas of fine motor skills, self-care skills and sensory processing skills during his two years at the Achievement Center. JA 350.

Likewise, the Petition mischaracterizes testimony from Jacob's teacher, Ms. Gerber. Contrary to Petitioners' assertions, Ms. Gerber did not testify that Jacob ". . . was only at the beginning stages of developing those skills, and he needed additional occupational therapy to develop them fully." Pet. at 4 (citing JA 186). Rather, she testified:

He was definitely making progress. As for as my goals, he made great progress, and I even note, looking on here, a lot of his OT ones, there was progress.

JA 186. Notably, this testimony was not in response to a question about Jacob's motor skills or the need for occupational therapy. Rather, it was in response to a general question about Jacob's overall progress. *Id.* Moreover, Ms. Gerber was not Jacob's occupational therapist and, contrary to Petitioners' assertions, did not make any recommendations regarding occupational therapy.

3. Parma Prepares For Jacob's Transition To Kindergarten By Observing Jacob And Meeting With His Preschool Teachers.

In preparation for Jacob's transition from preschool to kindergarten, on May 21, 2003, Kim Tomco, a Parma special education teacher, and Michelle Munici, a Parma speech/language pathologist ("SLP"), observed Jacob at the Achievement Center. Ms. Tomco and Ms. Munici spent a morning watching Jacob interact with adults and peers and talking to his teacher, classroom assistants and SLP. JA 249-50; 324-29. Ms. Tomco and Ms. Munici also observed Jacob work through various centers both one-on-one and in small groups. JA 252; 324-29. In speaking to Ms. Gerber, Ms. Tomco and Ms. Munici learned that Jacob behaved more appropriately when he was paired with more appropriate peers; that he had a tendency to pick on lower functioning students; that he was verbal and enjoyed being around people; that he needed high motivators to stay on task; that he was able to generalize skills; and that his academic skills were at grade level. JA 520-22.

4. Parma Proposes An IEP For The 2003-04 School Year.

Armed with information from the Achievement Center, Ms. Tomco, Ms. Munici, and Ms. d'Aliberti, another Parma special education teacher, developed a draft IEP.⁷ JA 161; 253; 330-31. The draft was

⁷ The Petition characterizes the 2003-04 IEP as "predetermined" and contends Petitioners' input was not considered. Pet. at 6. However, as Petitioners failed to raise the predetermination issue

developed based on observations of Jacob, discussions with his teacher and SLP, and review of data relating to Jacob's progress. *Id.* It was also based on Jacob's most recent IEP from the Achievement Center and incorporated suggestions provided by the Achievement Center staff.⁸ JA 330-31.

This proposed IEP was shared with Mrs. Winkelman and the other members of Jacob's IEP team at a June 2, 2003 IEP meeting. JA 322. The proposed IEP included six hours/day of instruction in a special education classroom; 60 minutes/week of speech therapy; an occupational therapy assessment; and accommodations such as a picture schedule and a reinforcement system. JA 254-56; 330; 477-87. Notably, the IEP specifically stated the purpose of the occupational therapy assessment was "***to determine school setting Occupational Therapy goals and treatment plan.***" JA 478. Further, the "summary of special education services" section of the IEP includes "occupational therapy".⁹ JA 487.

before the IHO, the District Court held it lacked jurisdiction to address the issue. Pet. App. 13-14a. The District Court went on to note that although Parma had not had an opportunity to defend against this allegation "... the administrative record does not support an allegation of predetermination." Pet. App. 14a.

⁸ All of this uncontroverted testimony is contrary to Petitioners' accusation that the educators who developed Jacob's draft IEP were "oblivious to Jacob's actual needs." Pet. at 6.

⁹ These statements are contrary to Petitioners' assertion that the IEP contained "no commitment to provide any occupational therapy." Pet. at 6.

Based on a review of Jacob's records and information shared by Ms. Gerber, Ms. Tomco and Ms. Munici, Jacob's IEP team, with the exception of Mrs. Winkelman, believed Jacob's least restrictive environment ("LRE") was a special education classroom at Pleasant Valley Elementary School. JA 487. Mrs. Winkelman signed the IEP, giving consent for the initiation of the special education services in the IEP, but noting her disagreement with the LRE.¹⁰ *Id.* Notably, this was the ***only area of the IEP with which Mrs. Winkelman expressed disagreement.*** *Id.* Mrs. Winkelman did not disagree with the occupational therapy assessment or any other element of the IEP. *Id.* In accordance with IDEA, Parma provided Mr. and Mrs. Winkelman with prior written notice regarding the sole area of disagreement – LRE. JA 514-15.

C. Summary of Proceedings Below

On June 2, 2003, Petitioners filed a request for due process pursuant to 20 U.S.C. § 1415(b)(6) alleging the IEP offered by Parma for the 2003-04 school year did not offer Jacob a FAPE. JA 353. Specifically, Petitioners challenged Parma's proposed public school placement at Pleasant Valley Elementary School ("Pleasant Valley"). Petitioners unilaterally placed Jacob at Monarch School, a private school for children with autism, and sought reimbursement from Parma for Jacob's tuition. Pet. App. 36a; 85a.

¹⁰ Contrary to Petitioners' assertion, no one "demanded" that Mrs. Winkelman sign the document, nor do Petitioners offer citation to the record in support of this statement.

Impartial Hearing Officer (IHO) Joy Freda was appointed by the Ohio Department of Education to preside over the hearing. After a four-day due process hearing, on February 20, 2004, IHO Freda issued a 56 page opinion finding in favor of Parma. Pet. App. 966. IHO Freda concluded that (1) Pleasant Valley was an appropriate placement for Jacob and (2) the Winkelmans were not entitled to reimbursement for Jacob's tuition at Monarch. Pet. App. 217-219a. Petitioners appealed and, on June 2, 2004, in a 44 page decision, State Level Review Officer ("SLRO") Theresa Hagan affirmed IHO Freda's decision in its entirety. Pet. App. 89a-92a.

On July 15, 2004, the Winkelmans appealed this administrative decision to the United States District Court for the Northern District of Ohio.¹¹ On March 2, 2005, the Winkelmans filed a "Brief in Support of Plaintiffs' Complaint, Motion for Summary Judgment, Motion to Supplement Record." Parma filed a Motion for Judgment on the Administrative Record on March 17, 2005. On June 2, 2005, the District Court granted Parma's Motion and upheld the decisions of the IHO and SLRO. Pet. App. 4a.

On July 1, 2005, Petitioners appealed this decision to the United States Court of Appeals for the Sixth Circuit. Petitioners took an interlocutory appeal to

¹¹ Petitioners originally sought an injunction designating Monarch School as Jacob's stay-put placement at Parma's expense. The District Court denied this request and Petitioners filed an interlocutory appeal. On January 25, 2006, the Sixth Circuit affirmed the District Court's denial of Petitioners' request for injunctive relief. *Winkelman v. Parma City Sch. Dist.*, 166 Fed. Appx. 807 (6th Cir. 2006).

this Court on the issue of whether they could proceed *pro se* in federal court under the IDEA on Jacob's behalf. This Court held Petitioners could proceed *pro se* in the Sixth Circuit on their own behalf and on behalf of their son. *Winkelman v. Parma City School District*, 550 U.S. 516 (2007). However, when the case was remanded to the Sixth Circuit for adjudication on the merits, Petitioners proceeded through counsel. After briefing and oral argument, on October 2, 2008, the Sixth Circuit held Parma offered Jacob a FAPE. Pet. App. 1-3a. Petitioners remain represented by counsel with respect to this Petition.

REASONS FOR DENYING THE PETITION

I. The Issue Raised By Petitioners Was Not Raised Below.

The Petition must fail as the issue Petitioners urge this Court to review was not raised below. It is well settled that this Court does not review issues that were not raised below save for extraordinary circumstances. "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927) (citations omitted). See also *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 221 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

After nearly six years of litigation, Petitioners allege, for the first time, that the testimony of occupational therapist Julie Peacock constituted

extrinsic evidence that should not have been considered. Pet. at 14-15. Petitioners' failure to raise this issue below is inexplicable as the IHO's reliance on Ms. Peacock's testimony was clearly set forth in her opinion. Specifically, the IHO relied on Ms. Peacock's reasons for choosing to assess Jacob's occupational therapy needs at the start of the 2003-04 school year instead of "recycling" his previous goals. Pet. App. 204-209a. The IHO concluded the inclusion of an occupational therapy assessment instead of goals did not deny Jacob a FAPE. *Id.*

Petitioners appealed this decision to a State Level Review Officer but did not argue the IHO erred by looking outside the "four corners" of the IEP or by relying on Ms. Peacock's testimony.¹² Pet. App. 50a. Nor did Petitioners raise this issue when they appealed the SLRO's decision to the District Court. As the District Court stated:

The issue is whether or not a guarantee to assess Jacob for occupational therapy as opposed to setting forth specific goals and objectives constitutes a substantive violation and denies Jacob a FAPE.

Pet. App. 16a. Nowhere in its opinion does the District Court address the extrinsic evidence/four corners issue Petitioners now assert. Rather, the District Court looked to what was actually contained in the IEP – not what could have been included as Petitioners contend

¹² Notably, none of the five assignments of error raised by Petitioners to the SLRO addressed occupational therapy. Pet. App. 50a.

– and concluded the absence of occupational therapy goals did not deny Jacob a FAPE. Pet. App. 22a.

When Petitioners appealed this decision to the Sixth Circuit, they once again did not raise the extrinsic evidence/four corners issue. Petitioners' assignment of error with respect to the District Court's occupational therapy finding states:

Whether the district court erred in finding that the related services provided in the Individualized Education Plan offered by the Parma City School District for the 2003-04 school year offered Jacob Winkelman a free appropriate public education in accordance with the Individuals with Disabilities Education Act.

Appellants' Final Brief (Filed February 22, 2008). Nor is the extrinsic evidence/four corners issue recognized by the Sixth Circuit in the portion of its opinion setting forth the issues on appeal. Pet. App. 2a.

As the record demonstrates, the extrinsic evidence/four corners issue Petitioners ask this Court to review was not raised below. Nor do Petitioners point to any extraordinary circumstances that would justify this Court departing from its usual practice of refusing to consider issues raised for the first time. Thus, the extrinsic evidence/four corners issue is not properly before this Court.

II. The Sixth Circuit's Decision Does Not Create A Circuit Split.

A. The Cases Cited By Petitioners Are Factually Distinguishable.

Even if the extrinsic evidence/four corners issue was properly before this Court, Petitioners' attempt to create a circuit split on this issue fails. None of the cases relied upon by Petitioners are factually analogous to the instant case. Specifically, in each of the cases cited by Petitioners, the courts determined they could not consider services *not offered in the IEP but testified to at hearing* when determining whether the IEP offered a FAPE. This is a very different issue than the one presented in this case – whether Ms. Peacock's testimony setting forth the *reasons* for providing the occupational therapy assessment, which *was offered* in the IEP, could be considered in determining whether the IEP offered Jacob a FAPE.

In *Union School District v. Smith*, 15 F. 3d 1519, 1525 (9th Cir. 1994), the hearing officer and district court concluded the program offered to an autistic student via a written offer did not meet his needs and ordered reimbursement for the program selected by the parents. The school district argued it had another program available which was not formally offered because the parents expressed unwillingness to consider it as a placement. *Id.* The issue before the appellate court was “whether the District was required to make a formal offer under the IDEA.” *Id.* The court held the school district was required to make a “formal, written offer” to the parents to give them the

opportunity to consider the program being proposed. *Id.* at 1526.

Similarly, in *County School Board of Henrico County v. Z.P.*, 399 F. 3d 298, 302 (4th Cir. 2005), the parents requested that the school district provide their son with a full time aide. This request was not accepted or rejected; rather, the IEP noted the “team did not refuse/reject this [request] however was unable to determine time frame for training.” *Id.* The parents rejected the IEP and decided to leave their son at a private school. *Id.* After the parents rejected the IEP, they were informally told an aide had been hired. However, the Board never formally provided this information, nor was the IEP amended to reflect the services of a full time aide. *Id.* On appeal, the school district argued the hearing officer erred by failing to consider the fact that an aide had been hired. *Id.* at 306, n. 5. The court concluded the hearing officer “properly focused on what was actually contained in the written IEP when determining the appropriateness of that IEP.” *Id.*

This issue was also addressed in *Sytsema v. Academy School District No. 20*, 538 F. 3d 1306 (10th Cir. 2008). In *Sytsema*, the school district made a verbal offer to increase services to a student at an informal meeting and did not amend the IEP to include this offer. *Id.* at 1310. The school district argued the court should consider both the written IEP and the verbal offer. *Id.* at 1315. The court rejected this argument, holding that courts should only consider the services offered in the written IEP. *Id.*

None of the cases cited by Petitioners are analogous to the instant case. Here, unlike *Smith, Z.P.*, and

Sytsema, Parma made a "formal offer", via a written IEP, and did not ask the lower courts to consider services that were not included on the IEP. Rather, Parma asked the lower courts to conclude that, given Jacob's specific circumstances, the provision of an occupational therapy assessment in the IEP, as opposed to specific occupational therapy goals, was appropriate and provided a FAPE.

To support its argument, Parma offered the written IEP, bolstered by testimony from Julie Peacock, the occupational therapist who authored the occupational therapy component of the IEP. JA 273. In her testimony, Ms. Peacock explained why she had included the occupational therapy assessment in the IEP instead of occupational therapy goals.

I said I would evaluate him at the beginning of the school year, and that if the parents wanted, we would do – one of the parents' concerns was that there were not sensory things put into the current [Achievement Center] IEP. It was stated that we couldn't determine what should go into his IEP for sensory until we figured out what his sensory needs were. This [Pleasant Valley] was a new environment, and we weren't sure how he was going to transition. So, there was no point in putting that in until we knew how he did in the beginning and figured out how to modify the environment for him.

JA 274. Ms. Peacock went on to explain that she could not simply use the information from the Achievement Center because:

It's a different place, new school; different environment, and this is very typical; that we think it's best to do it when we get to know the child a little bit and he as been here for a while and we see how he is actually doing and what problems he is having.

JA 274. Ms. Peacock also testified she was not comfortable simply using the occupational therapy goals from the Achievement Center because:

... they were things like tying his shoes which at 5 to 6, you should be working on, but he shouldn't actually quite know how to do it yet. It would be good if he could. Cutting out squares and things like that, I really wanted to see where he was at before I put on goals. He might need harder goals, and I really wanted to look at where the problems were accruing instead of just putting on a goal. If it was a sensory problem we needed to attack it from more of a sensory issue and not just cutting on a line.

JA 273. This testimony was credited by IHO Freda who stated:

Julie Peacock was a vibrant woman who exuded pride in her profession and in her ability to perform its duties capably. It was clearly her intent to establish the current levels of performance of the child within the scope of his new environment at Pleasant Valley Elementary School. . . She also made salient points with respect to certain areas addressed in the occupational therapy objectives of his

2002-2003 IEP. Ms. Peacock stated it was not uncommon for a child of his approximate age or grade level to require assistance with shoe tying and cutting out shapes. . . . While it would be simple to recycle a goal not yet mastered in the prior IEP and incorporate that goal into the proposed IEP, Ms. Peacock's preference was to address problems that occurred directly as a result of his disability, as opposed to age-related challenges.

Pet. App. 205-206a.

Consideration of this testimony, which explained Ms. Peacock's reasons for including the occupational therapy assessment in the IEP document, did not violate or implicate the "four corners" rule set forth in *Smith, Z.P.*, and *Sytsema*. As is clear from the record, Parma did not ask the IHO to consider services that were not included on the IEP. Indeed, the written IEP included "occupational therapy" in the summary of services and an explanation that the occupational therapy assessment was "*to determine school setting Occupational Therapy goals and treatment plan.*" JA 478; 487. (emphasis added). The IHO was asked to consider whether the lack of occupational therapy goals and objectives denied Jacob a FAPE in light of the statements in the IEP and Ms. Peacock's explanation of the team's decision to include an occupational therapy assessment. Therefore, the Sixth Circuit's decision, affirming the District Court's finding that the lack of occupational therapy goals did not deny Jacob a FAPE, is not in conflict with the cases cited by Petitioners and does not create a circuit split.

B. Petitioners Cannot Bring This Case In Line With *Smith, Z.P.*, and *Sytsema* By Relying On The District Court's "Implied" Conclusion.

Petitioners attempt to bring this case into line with *Smith, Z.P.*, and *Sytsema* by contending the District Court relied on extrinsic evidence "in support of its conclusion that goals and objectives would be written, and his (*implied*) conclusion that the school district was in fact offering OT services as part of Jacob's program." Pet. at 14-15 (emphasis added). There is no evidence, however, that the District Court reached a conclusion, implied or otherwise, about whether goals and objectives would be written.¹³ Rather, as the District Court's opinion makes clear, the court understood no goals were included in the proposed IEP.

The parties agree that Jacob's 2003-04 IEP did not contain specific goals and objectives for occupational therapy. Instead, it guaranteed to assess Jacob for occupational therapy and mandated that such assessment be completed within thirty days of the new school year.

Pet. App. 15-16a.

Given this fact, the legal issue set forth by the District Court was "whether or not a guarantee to

¹³ If the District Court did reach this (implied) conclusion, it is fully supported by the statement in the IEP regarding the purpose of the occupational therapy assessment and inclusion of occupational therapy in the summary of services. JA 478; 487.

assess Jacob for occupational therapy as opposed to setting forth specific goals and objectives constitutes a substantive violation and denies Jacob a FAPE." Pet. App. 16a. On this issue, the court concluded "the lack of goals and objectives for occupational therapy only constitutes a procedural technical violation of the IDEA and not reversible error." Pet. App. 22a. Thus, there is no "implied" finding by the District Court that would bring this case in line with *Smith, Z.P.*, and *Sytsema*. Nor would it be appropriate to grant *certiorari* based on a circuit split created by an "implied" finding by the lower court.

C. Petitioners' Representation Of Current Sixth Circuit Law Is Incorrect.

Petitioners' reliance on *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990) and *Cleveland Heights-University Heights City School District v. Boss*, 144 F.3d 391 (6th Cir. 1998) in support of the proposition that in the Sixth Circuit "whether an IEP should be evaluated within its four corners *or not* seems to boil down to a fact-specific analysis" is misplaced. Pet. at 15 (emphasis in original). Both *Defendant I* and *Boss* dealt with IEPs that were missing information. In *Defendant I*, the court held the missing information did not deny the student a FAPE and constituted a technical procedural violation. *Defendant I*, 898 F. 2d at 1191. In *Boss*, the court concluded that the missing information "went to the heart and substance of the plan" and its absence denied the student a FAPE. *Boss*, 144 F. 3d at 399. In both cases, the court looked to the actual contents of the IEP – not outside offers – when making a decision. The fact specific aspect of the inquiry was whether the missing information was substantial enough to constitute a denial of FAPE.

Thus, neither *Defendant I* nor *Boss* supports Petitioners' circuit split argument.

III. The Position Advocated By Petitioners Does Not Comport With The IDEA's Statutory Scheme.

The "four corners" theory Petitioners urge this Court to adopt is nonsensical when considered in light of the IDEA's statutory scheme. The IDEA provides both parties in a due process hearing with certain rights – including the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. 20 U.S.C. § 1415(h). In this case, one of the witnesses called was Ms. Peacock – the therapist responsible for drafting the occupational therapy component of the IEP. As discussed above, Ms. Peacock testified about her *reasons* for including an occupational therapy assessment in the IEP instead of goals and objectives given Jacob's specific circumstances and needs.

Petitioners argue Ms. Peacock's testimony constitutes extrinsic evidence that should not have been considered. Under Petitioners' theory, testimony from a member of an IEP team regarding the reasoning behind IEP team decisions is not appropriately before a hearing officer or court. This testimony, however, is vitally important because the IEP itself does not set forth the reasoning behind team decisions regarding the content of the IEP. 20 U.S.C. § 1414(d)(1)(A)(i) (setting forth required components of an IEP). Decisions regarding the appropriateness of a child's IEP are simply too important to be based on only a portion of the available information. This is why the statutory right to present evidence and

confront, cross-examine and compel the attendance of witnesses exists. A rule that does not permit consideration of this evidence completely undermines these rights.

Moreover, application the "four corners" theory in the manner urged by Petitioners would completely abrogate the necessity of a due process hearing – one of the fundamental procedural safeguards provided by the IDEA. 20 U.S.C. § 1415(b)(6). If Petitioners' theory had been applied in this case, the IHO would simply have read the IEP and decided, based on the face of the document, whether it provided a FAPE. No hearing or testimony would have been necessary. Under this approach, however, the IHO would not have had the benefit of Ms. Peacock's expertise regarding the challenges of moving an autistic student to a new school environment. Nor would the IHO have heard about the parents' concerns regarding Jacob's sensory issues. There is simply no reason to deprive hearing officers and courts of vital information such as this. Moreover, doing so does not comport with IDEA's purpose or statutory scheme.

IV. The Inclusion Of An Occupational Therapy Assessment Instead Of Goals And Objectives Did Not Deny Jacob A FAPE.

This case is not an appropriate vehicle for *certiorari* because even if this Court concluded the lower courts erred in looking outside the "four corners" of the IEP, it would not change the outcome of this case. See *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts

among the Courts of Appeals is judicial, not simply administrative or managerial.”). Here, Petitioners argued the inclusion of an occupational therapy assessment instead of occupational therapy goals and objectives denied Jacob a FAPE. As the party challenging the IEP, Petitioners bore the burden of proof on this issue. *Schaffer v. Weast*, 546 U.S. 49 (2005). They have not carried this burden, nor could they even if this Court adopted the “four corners” theory they urge.

There is no evidence that the provision of an occupational therapy assessment, as opposed to the inclusion of goals and objectives, denied Jacob a FAPE. Rather, as the District Court concluded, the absence of goals and objectives in this area constituted a procedural violation. Pet. App. 22a. “[A] procedural violation of the IDEA is not a per se denial of FAPE . . . ; rather, a school district’s failure to comply with the procedural requirements of the Act will constitute a denial of FAPE *only if such violation causes substantive harm to the child or his parents.*” *N.L. v. Knox City Schs.*, 315 F.3d 688, 693 (6th Cir. 2003) (citation omitted) (emphasis added). Substantive harm occurs when the child is deprived of an IEP, or when the procedural violation causes the loss of educational opportunity. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 520 (6th Cir. 2003) (citation omitted).

Here, there is no evidence of substantive harm. Occupational therapy is a related service designed to

support a student's special education program.¹⁴ 34 C.F.R. § 300.34(a). The IDEA imposes no obligation to provide a related service unless it is "required to assist a child with a disability to benefit from special education." *Neely v. Rutherford Cty. Sch.*, 68 F.3d 965, 969 (6th Cir. 1995). *See also Irving Indep. Sch. Sys. v. Tatro*, 468 U.S. 883, 894 (1984). Petitioners presented no evidence that Jacob could not benefit from the special education services in his IEP without occupational therapy goals and objectives.

It is well documented that occupational therapy was not Jacob's greatest area of need. To the contrary, as Jacob's MFE demonstrated and the IHO noted, "Jacob [was] *age appropriate* with respect to the majority of the motor skills required for kindergarten readiness as defined by various of the witnesses at hearing and as set forth on the TEACCH checklist." Pet. App. 207-208a (emphasis added). Indeed, the shoe tying and other occupational therapy goals Jacob worked on at the Achievement Center focused on skills he was not expected to have mastered given his age. JA 273. Given these undisputed facts, there is no evidence that the inclusion of an occupational therapy assessment, rather than occupational therapy goals, denied Jacob a FAPE.

As a decision from this Court regarding the "four corners" theory urged by Petitioners will not impact the outcome of the case, this case is a poor vehicle for *certiorari*.

¹⁴ Assessments, such as the occupational therapy assessment included in the IEP, also constitute related services. 34 C.F.R. § 300.34(a).

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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